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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA
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16 MEGAN HAMILTON,) 2:07-cv-01413-HDM-RJJ
17 Plaintiff,)
18 vs.) ORDER
19 BILL AUBREY, MELINDA RESACRUDO,)
20 and CLARK COUNTY,)
21 Defendants.)
_____)

22 Before the court is defendants Clark County and Melinda
23 Resacrudo's ("Resacrudo") motion to dismiss (#17). The plaintiff
24 Megan Hamilton ("plaintiff") has opposed (#20), and the defendants
25 have replied (#21).

26 On September 20, 2005, plaintiff obtained a protective order
27 against John Papilli ("Papilli") from the Justice Court of Mesquite
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1 Township in Clark County. Just before the order was to expire,
2 plaintiff went to Justice Court to have it extended. According to
3 the complaint, Resacrudo "incorrectly advised the plaintiff that
4 the order could not be extended and allowed the order to expire."
5 On the night of November 4, 2005, Papilli shot plaintiff and then
6 killed himself. Defendant Bill Aubrey ("Aubrey") allegedly
7 provided Papilli with the gun.

8 Plaintiff has sued Aubrey, Resacrudo, and Clark County. The
9 first cause of action, negligent entrustment, is only against
10 Aubrey, who is not involved in this motion to dismiss. The only
11 federal claim is the second cause of action under 42 U.S.C. § 1983.
12 The third and fourth causes of action are tort claims against
13 Resacrudo only. Defendants Clark County and Resacrudo have moved
14 to dismiss counts 2, 3, and 4 of the complaint.

15 In considering a motion to dismiss for failure to state a
16 claim under Fed. R. Civ. P. 12(b)(6), the court must accept as true
17 all material allegations in the complaint as well as all reasonable
18 inferences that may be drawn from such allegations. *LSO, Ltd. v.*
19 *Stroh*, 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the
20 complaint also must be construed in the light most favorable to the
21 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th
22 Cir. 2000). The purpose of a motion to dismiss under Rule 12(b)(6)
23 is to test the legal sufficiency of the complaint. *Navarro v.*
24 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court can grant the
25 motion only if it is certain that the plaintiff will not be
26 entitled to relief under any set of facts that could be proven
27 under the allegations of the complaint. *Cahill v. Liberty Mut.*
28 *Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). The court need not,

1 however, accept as true those allegations that (1) contradict
2 matters properly subject to judicial notice; (2) are conclusory
3 allegations of law, mere legal conclusions, unwarranted deductions
4 of fact, or unreasonable inferences; (3) are contradicted by
5 documents referred to in the complaint; or (4) are internally
6 inconsistent. *Shwarz*, 234 F.3d at 435; *Pareto v. F.D.I.C.*, 139
7 F.3d 696, 699 (9th Cir. 1998); *Clegg v. Cult Awareness Network*, 18
8 F.3d 752, 754-55 (9th Cir. 1994); *Branch v. Tunnell*, 14 F.3d 449,
9 454 (9th Cir. 1994), *rev'd on other grounds by Galbraith v. County*
10 *of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Western Mining*
11 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Response*
12 *Oncology, Inc. v. MetraHealth Ins. Co.*, 978 F.Supp. 1052, 1058
13 (S.D. Fla. 1997).

14 I. Individual § 1983 Liability (Resacrudo)

15 To prove a violation under § 1983, plaintiff must establish
16 that the defendant (1) acting under color of law (2) deprived
17 plaintiff of the rights, privileges, or immunities secured by the
18 Constitution or the laws of the United States. *Amer. Mfrs. Mut.*
19 *Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Resacrudo argues
20 not only that plaintiff has failed to state a claim for § 1983
21 liability against her, but also that she is entitled to absolute,
22 quasi-judicial immunity.

23 Quasi-judicial immunity protects those performing functions
24 "closely associated with the judicial process." *Duvall v. County*
25 *of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001) (quoting *Moore v.*
26 *Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996)). In determining
27 whether an official is entitled to absolute immunity, the court
28 must look at the nature of the function performed as opposed to the

1 identity of the official performing it. *In re Castillo*, 297 F.3d
2 940, 948 (9th Cir. 2002). Officials are entitled to immunity where
3 their judgments are "functionally comparable" to those of judges.
4 *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993); see
5 also *Buckles v. King County*, 191 F.3d 1127, 1133 (9th Cir. 1999).

6 The Ninth Circuit has held that "court clerks have absolute
7 quasi-judicial immunity from damages for civil rights violations
8 when they perform tasks that are an integral part of the judicial
9 process . . . unless [the] acts were done in the clear absence of
10 all jurisdiction." *Mullis v. U.S. Bankr. Court*, 828 F.2d 1385,
11 1390 (9th Cir. 1987). This includes merely administrative acts
12 that are a part of the judicial function, including a clerks'
13 filing or refusing to file documents with the court. *Id.*; *In re*
14 *Castillo*, 297 F.3d at 952. The Ninth Circuit has affirmed this
15 holding several times since the *Antoine* decision.¹ *In re Castillo*,
16 297 F.3d at 952; see also *Brown v. Ponzoha*, 171 Fed. App'x 596, 597
17 (9th Cir. 2006) (unpublished disposition); *Haile v. Sawyer*, 76 Fed.
18 App'x 129, 130 (9th Cir. 2003) (unpublished disposition); *Wilbanks*
19 *v. Crotts*, 1995 WL 7519, at *1 (9th Cir. 1995) (unpublished
20 disposition); *Dobard v. U.S. Dist. Court for N. Calif.*, 1994 WL
21 615719, at *2 (9th Cir. 1994) (unpublished disposition); *Cortland*
22 *v. Cowlitz County Clerk's Office*, 2007 WL 858342, at *5 (W.D. Wash.
23 Mar. 16, 2007) (holding as covered by absolute immunity court
24 clerk's failure to issue subpoenas). But see *Samuel v. Michaud*,

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27 ¹ The Seventh Circuit case cited by plaintiff, *Snyder v. Nolan*,
28 380 F.3d 279 (7th Cir. 2004), recognizes that its conclusion disagrees
with that reached by the Ninth Circuit in *Mullis*, but it suggests that
the Ninth Circuit's decision may have been different after the Supreme
Court's decision in *Antoine*. *Snyder*, 380 F.3d at 288 n.7.

1 980 F. Supp. 1381, 1403 (D. Idaho 1996), *aff'd* 129 F.3d 127 (9th
2 Cir. 1997) (holding as not covered by absolute immunity the upkeep
3 of files and exhibits, the filing of documents, the scheduling of
4 hearings, and the transcribing of proceedings from tape recordings
5 because they are administrative in nature and do not require
6 judicial discretion). Immunity applies even if the act was done in
7 excess of the official's authority, as long as it was done within
8 her jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

9 In *Mullis*, the court held the following functions were
10 entitled to absolute immunity: (1) the clerk's failure to give
11 proper counseling and notice regarding the chapters of the
12 Bankruptcy Code under which the plaintiff could file, as allegedly
13 required by statute; (2) the clerk's acceptance and filing of an
14 incomplete bankruptcy petition; and (3) the clerk's later refusal
15 to accept an amended petition. *Mullis*, 828 F.2d at 1390. It found
16 that each of those functions were integral parts of the judicial
17 process and that they were within the clerk's "general subject
18 matter jurisdiction." *Id.*

19 Here, plaintiff's sole claim against Resacrudo is that she
20 incorrectly advised her that the protective order could not be
21 extended and it therefore expired. Resacrudo's action is similar
22 to the *Mullis* clerk's refusal to accept an amended petition and
23 failure to give properly counseling. Giving advice involves
24 discretion and is precisely what the doctrine of absolute immunity
25 is intended to cover. And at least one case has held that judicial
26 advice, even in violation of state law and ethics rules, is
27 entitled to absolute immunity. See *Cooper v. Parrish*, 203 F.3d
28 937, 944-46 (6th Cir. 2000) (holding a chancellor's advice to

1 prosecutors on how to draft *ex parte* motions was related to his
2 judicial function and covered by absolute immunity, even if it was
3 improper under ethical and state laws). While there may be some
4 question about whether Resacrudo's act was done in excess of her
5 authority, plaintiff has failed to state a claim that it was done
6 in the clear absence of all jurisdiction, since Resacrudo's act
7 related to her judicial function. Accordingly, the court finds
8 Resacrudo is entitled to absolute, quasi-judicial immunity, and the
9 § 1983 claim against her must be dismissed.

10 II. Municipal § 1983 Liability (Clark County)

11 A municipality may be held liable only where it inflicts an
12 injury; it may not be held liable under a *respondeat superior*
13 theory. *Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S.
14 658, 691 (1978); *Gibson v. County of Washoe*, 290 F.3d 1175, 1185
15 (9th Cir. 2002). A municipality is directly liable for injuries
16 inflicted pursuant to its own policies, regulations, customs, or
17 usage. *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994). The
18 municipality is indirectly liable where an omission amounts to
19 deliberate indifference to the rights of persons with whom the
20 police come into contact, and the deficiencies are closely related
21 to the plaintiff's ultimate injury. *City of Canton v. Harris*, 489
22 U.S. 378, 388-91 (1989). To establish liability by omission,
23 plaintiff must show that a (1) county employee violated her rights;
24 (2) the county has customs or policies that amount to deliberate
25 indifference; and (3) these policies were the "moving force" behind
26 the employee's violation of plaintiff's constitutional rights.
27 *Gibson*, 290 F.3d at 1193-94.

28 Clark County argues that plaintiff cannot show its acts or

1 omissions led to plaintiff's injury. While plaintiff may very well
2 have difficulty showing causation, that is a factual issue which
3 may not be resolved under the standards governing motions to
4 dismiss. Nevertheless, plaintiff has failed to allege that she has
5 a protectable liberty or property interest under the Constitution.

6 Plaintiff's complaint asserts that defendants violated her
7 Fourth, Fifth, and Fourteenth Amendment rights. Defendants
8 correctly argue that the Fourth and Fifth Amendment claims cannot
9 be sustained, and plaintiff does not address them in her
10 opposition. Accordingly, this order addresses only the Fourteenth
11 Amendment claim.

12 In her complaint, plaintiff asserts the protective order she
13 was issued should have provided for a hearing for extension prior
14 to its expiration, and that such failure violated her Fourteenth
15 Amendment rights to due process and equal protection. *See also* Pl.
16 Opp'n 7 ("Plaintiff alleges that her equal protection and due
17 process rights were violated when Melinda Resacrudo aka Melina
18 Pisacreta incorrectly advised Plaintiff that the order could not be
19 extended and allowed the order to expire."). Specifically,
20 plaintiff alleges Resacrudo acted pursuant to a "de facto" policy
21 to not adequately set extension hearings before protective orders
22 expire and that county officials knew of the policy and failed to
23 discipline or supervise its employees, effectively sanctioning the
24 policy. Plaintiff explains the legal basis of her constitutional
25 claim only once, stating in her opposition that she "had a
26 constitutional right of due process to be insulated from violence
27 from Mr. Papilli." Pl. Opp'n 11.

28 A. Due Process

1 Fourteenth Amendment due process falls into one of two
2 classes: (1) substantive due process; and (2) procedural due
3 process. To prove a violation of either substantive or procedural
4 due process, the plaintiff must show a deprivation of a cognizable
5 liberty or property interest protected by the Constitution.
6 *Williby v. City of Oakland*, 2008 WL 686014, at *4 (N.D. Cal. Mar.
7 13, 2008). Plaintiff does not specify whether the due process
8 rights she asserts were procedural or substantive.

9 i. Substantive Due Process

10 Substantive due process protects individuals from arbitrary
11 deprivation of their life, liberty, or property by the government.
12 *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006). "Only the
13 most egregious official conduct can be said to be arbitrary in a
14 constitutional sense." *Id.* (quoting *County of Sacramento v. Lewis*,
15 523 U.S. 833, 846 (1998)). To establish this claim, a plaintiff
16 must show both (1) a deprivation of life, liberty, or property, and
17 (2) "conscience shocking behavior by the government." *Id.*

18 Substantive due process does not provide any affirmative right
19 to governmental aid, even where necessary to secure life, liberty,
20 or property interests of which the government may not deprive the
21 individual. *DeShaney v. Winnebago County Dep't of Social Servs.*,
22 489 U.S. 189, 196 (1989). In fact, a State denies an individual's
23 substantive due process only where it affirmatively restrains an
24 individual's freedom to act on his own behalf, not where it fails
25 to act to protect an individual's liberty interests against harms
26 inflicted by other means. *Id.* at 200. In *DeShaney*, a boy who had
27 been so beaten by his father as to be rendered permanently disabled
28 sued the social services workers who had notice of prior abuse but

1 failed to protect the boy. The plaintiffs in that case asserted a
2 substantive due process claim, alleging the defendants deprived the
3 boy of his liberty without due process by failing to adequately
4 protect him from his father. *Id.* at 194-95. The Supreme Court
5 held:

6 [N]othing in the language of the Due Process Clause
7 itself requires the State to protect the life,
8 liberty, and property of its citizens against
9 invasion by private actors. The Clause is phrased as
10 a limitation on the State's power to act, not as a
11 guarantee of certain minimal levels of safety and
12 security. It forbids the State itself to deprive
13 individuals of life, liberty, or property without
14 "due process of law," but its language cannot fairly
15 be extended to impose an affirmative obligation on
16 the State to ensure that those interests do not come
17 to harm through other means.

18 *Id.* at 196.

19 The basis of plaintiff's constitutional claim is that she had
20 a right to be insulated from violence by a third party, Papilli.
21 This is clearly not a protectable liberty interest under *DeShaney*.
22 Moreover, there is no allegation in the pleadings that the
23 defendants' actions put plaintiff in harm's way, thereby stating a
24 claim of state-created danger. Accordingly, there are no set of
25 facts that may be proven under the allegations of the complaint
26 that will support a substantive due process claim.

27 B. Procedural Due Process

28 The Fourteenth Amendment protects individuals against the
deprivation of liberty or property by the government without due
process. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th
Cir. 1993). Procedural due process claims require proof of two
elements: (1) a protectable liberty or property interest; and (2) a
denial of adequate procedural protections. *Thornton v. City of St.*

1 *Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). As noted, plaintiff
2 cannot assert a protectable liberty interest on the basis of her
3 allegations in the complaint.

4 Property interests are not created by the Constitution, but
5 by "existing rules or understandings from an independent source
6 such as state law rules or understandings that secure certain
7 benefits and that support claims of entitlement to those benefits."
8 *Id.* (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S.
9 564, 577 (1972)). To have a property interest in a benefit, a
10 person must have a legitimate claim of entitlement to it. *Roth*,
11 408 U.S. at 577. A benefit is not a protected entitlement where
12 government officials may grant or deny it in their discretion.
13 *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005);
14 *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462-63 (1989).
15 Protected entitlements "arise only when the relevant state law
16 provisions truly make the conferral of the benefit mandatory." *Or.*
17 *Entm't Corp. v. City of Beaverton*, 233 Fed. App'x 618, 619 (9th
18 Cir. 2007) (unpublished disposition).

19 Whether a substantive interest created by an independent
20 source such as state law "constitutes a property interest for
21 purposes of the 14th Amendment is ultimately a question of federal
22 constitutional law." *Town of Castle Rock*, 545 U.S. at 757. The
23 analysis is two-pronged: first, the court determines what the state
24 law provides; and second, if state law provides an entitlement, the
25 court determines whether that entitlement rises to the level of a
26 property interest for the purposes of the Fourteenth Amendment.
27 See *id.* at 757, 766-67.

28 In *Town of Castle Rock*, the Supreme Court looked extensively

1 at Colorado law to determine whether it provided the plaintiff with
2 an entitlement to enforcement of a restraining order. 545 U.S.
3 748. Although the restraining order itself contained what seemed
4 like mandatory language ("a peace officer *shall* arrest, or if an
5 arrest would be impracticable under the circumstances, seek a
6 warrant for the arrest of a restrained person when the peace
7 officer has information amounting to probable cause that . . . the
8 restrained person has violated . . . any provision of a restraining
9 order. . . ."), the Supreme Court held an entitlement was not
10 created under Colorado law for two reasons. *Id.* at 752 (emphasis
11 added). First, it held that many statutes contain similar
12 mandatory language for police officers but that the law recognizes
13 officers act in their discretion. *Id.* at 760. Second, whatever
14 entitlement the order provided was unclear; the court noted it
15 could have been that plaintiff was entitled to have her husband
16 arrested, or that she was entitled to efforts to have her husband
17 arrested, or that she was entitled to the police seeking an arrest
18 warrant. Because so many possibilities existed none of them was
19 mandatory and thus none created an enforceable property interest.
20 *Id.* at 764-65. The court further noted that if the entitlement was
21 to have the police seek an arrest warrant, this was nothing more
22 than an entitlement to a procedure, which is insufficient to even
23 support standing. *Id.* at 765. In sum, the Court noted that

24 [i]n light of today's decision and that in *DeShaney*,
25 the benefit that a third party may receive from having
26 someone else arrested for a crime generally does not
27 trigger protections under the Due Process Clause,
28 neither in its procedural nor in its 'substantive'
manifestations.

Id. at 768.

1 Plaintiff's claim is weaker than that asserted in *Town of*
2 *Castle Rock*. If holders of protective orders are not entitled to
3 evoke the protections of procedural due process when those orders
4 are not enforced, then holders of protective orders that are about
5 to expire are not entitled to hearings on whether to extend those
6 orders. Moreover, Nevada law regarding protective orders provides
7 the courts with ample discretion.² Nev. Rev. Stat. § 33.020(1)
8 states that

9 [i]f it appears to the satisfaction of the court from
10 specific facts shown by a verified application that an
11 act of domestic violence has occurred or there exists a
12 threat of domestic violence, the court *may* grant a
temporary or extended order [for protection against
domestic violence] (emphasis added).

13 It further states that in deciding whether to grant or deny a
14 temporary or extended order the court "may" require either or both
15 parties to appear before the court. *Id.* § 33.020(2).³ Clearly,
16 both the issuance of protective orders and whether to conduct
17 hearings on applications for protective orders are discretionary
18 with the court. Thus, plaintiff had no legitimate entitlement to
19 either the order or to a hearing on the order, and her procedural
20 due process claim must fail as a matter of law.

21 C. Equal Protection

22 The Fourteenth Amendment's equal protection clause "directs
23 that 'all persons similarly circumstanced shall be treated alike.'"
24 *Plyler v. Doe*, 457 U.S. 202, 216 (1982). To prove her equal

25 ² It is not clear from the pleadings what authority the
26 protective order in this case was issued under, but Nevada state law
27 regarding protective orders can provide some guidance in determining
whether plaintiff has a cognizable property interest.

28 ³ The language regarding protective orders for harassment in the
workplace is similarly discretionary. See Nev. Rev. Stat. § 33.270.

1 protection rights were violated, the plaintiff must show either (1)
2 the defendants acted with an intent or purpose to discriminate
3 against her based upon membership in a protected class, *Thornton*,
4 425 F.3d at 1166-67, or (2) she was treated differently from
5 similarly situated individuals, and there was no rational basis for
6 the difference in treatment, *Village of Willowbrook v. Olech*, 528
7 U.S. 562, 564 (2000).

8 Plaintiff has failed to allege membership in any group or
9 classification unfairly targeted by either Resacrudo's actions or
10 Clark County's policies. Moreover, she has not alleged that she
11 was treated differently by Resacrudo or Clark County than any other
12 persons similarly situated. Accordingly, plaintiff's equal
13 protection claim must be dismissed.

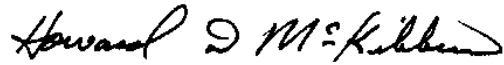
14 Because the plaintiff has failed to allege any cognizable
15 constitutional violation, Clark County cannot be held liable under
16 § 1983. See *Town of Castle Rock*, 548 U.S. at 768 (noting that
17 because the court determined plaintiff had no property interest in
18 the enforcement of a restraining order, it did not have to reach
19 the question of whether the municipality's policies or customs
20 prevented the police from giving the plaintiff due process when
21 they deprived her of that right).

22 The defendants' motion to dismiss (#17) is granted as to count
23 2. This dismisses the only federal claim, and since there is no
24 other basis for federal jurisdiction the court declines to exercise
25 supplemental jurisdiction over plaintiff's state law claims.⁴ The

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27 ⁴A district court need not actuate supplemental jurisdiction if
28 it has dismissed all claims over which it has original jurisdiction.
28 U.S.C. § 1367(c)(3); see *Moore v. Kayport Package Express, Inc.*,
885 F.2d 531, 537 (9th Cir. 1989). It is generally preferable to

1 plaintiff's supplemental state claims (counts 1, 3, and 4) are
2 dismissed without prejudice to file in state court.

3 DATED: This 15th day of April, 2008.

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6 UNITED STATES DISTRICT JUDGE
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27 _____
28 dismiss pendent state claims after federal claims have been dismissed.
McCarthy v. Mayo, 827 F.2d 1310, 1317 (9th Cir. 1987).